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and 24 Vic., c. 88, but to secure that, in cases analogous to those of offences committed within the jurisdiction of the Admiralty, though not strictly within it, the same rules of procedure shall apply.

NORRIS, J.—I am of the same opinion and substantially for the reasons given by my brother Wilson.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1889 *February 8.*

POREESH NATH MOJUMDAR (DEFENDANT) *v.* RAMJODU MOJUMDAR AND ANOTHER (PLAINTIFFS).*

Redemption, right of—Foreclosure decree—Order absolute—Redemption of mortgage before order absolute—Transfer of Property Act (IV of 1882), s. 87.

In a foreclosure action, the mortgagor can redeem at any time until the order absolute is made under s. 87 of the Transfer of Property Act, 1882.

ON the 4th January 1886 Ramjadu Mojumdar and another (mortgagees) obtained an *ex-parte* decree for foreclosure under s. 86 of the Transfer of Property Act, 1882, against Poresh Nath Mojumdar (the mortgagor), six months' time being allowed for the payment of the mortgage debt. The six months provided in the decree expired on the 4th July 1886, and the mortgage debt was not repaid. The mortgagees, without having previously obtained an order under s. 87 of the Transfer of Property Act 1882, making the foreclosure decree absolute, obtained an order for possession of the mortgaged property in December 1886, and got possession accordingly on the 14th January 1887.

In May 1887 the mortgagor Poresh Nath Mojumdar made an application to the Munsiff of Jhenidah to be allowed to redeem the mortgaged property, having paid the amount of the mortgage debt and costs into Court. The Munsiff was of opinion that the order of December 1886, giving possession to the mortgagees, was illegal, according to the provisions of s. 87 of the

* Appeal from Order No. 380 of 1888, against the order of F. E. Pargiter, Esq., Judge of Jessore, dated the 28th of June 1888, reversing an order of Baboo Bunwari Lal Bannerjee, Munsiff of Jhenidah, dated the 5th of May 1888.

Transfer of Property Act; and, as no order making the foreclosure decree absolute had been obtained under that section, the mortgagor was entitled to redeem. Accordingly, on the 5th May, he made an order for redemption. From this order the mortgagees appealed to the District Judge of Jessore, who reversed the order of the Munsiff for the following reasons: "Section 86 expressly states that if payment is not made within the fixed time, the defendant shall be absolutely debarred of all right to redeem the property. Section 87 gives the Court power to enlarge the time, but, in the absence of this extention, there appears to be no liberty allowed the debtor to redeem after time. The wording of the section is noteworthy. It declares that the decree *shall* debar the debtor of all right to redeem after the fixed time, whereas it only says that on the lapse of that time the decree-holder *may* apply for the decree absolute, and again if he does apply the Court *shall* grant it."

Poresh Nath Mojumdar appealed to the High Court.

Mr. *B. Chakravarti* and Baboo *Jadub Chunder Seal* for the appellant.

Baboo *Srinath Das* for the respondents.

Mr. *Chakravarti*—The judgment of the Lower Court is wrong. As to the nature of a mortgage decree, see Seton on Decrees, 4th Ed., pp. 1035, 1089. The form of decree in a mortgage suit under s. 86 of the Transfer of Property Act 1882, has been taken from the common form in use in England—Macpherson on Mortgages, 7th Ed., pp. 692-4. The Courts of Equity in England can re-open a foreclosure even after the final order—Coote on Mortgages, 4th Ed., pp. 1024, 1026, and cases cited there. *Campbell* v. *Holyland* (1) shows that in a foreclosure suit a mortgagor can redeem even after the order for foreclosure absolute. At all events there is no doubt that he can redeem before the order absolute has been made under s. 87 of the Transfer of Property Act 1882. See *Thompson* v. *Grant* (2) and *Senhouse* v. *Earl* (3).

It is always a matter of discretion whether time ought to be extended to allow the mortgagor to redeem under s. 87. The Judge here has ignored s. 87 altogether.

(1) L. R., 7. Ch. D., 166. (2) 4 Mad., 438.
(3) 2 Ves, Sen., 450.

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Baboo *Srinath Das* for the respondents.—Section 86 says that the defendant in a foreclosure suit shall be absolutely debarred of all right to redeem after the lapse of six months from the date fixed by the Court for payment of principal and interest secured by the mortgage. It is not open to the mortgagor after the lapse of this fixed period to come in and offer to redeem. Mere effluxion of time extinguishes his right to do so.

There is no obligation on the mortgagee to make the application for order absolute contemplated by s. 87. The Legislature uses the word "may" in this section, whereas it uses "shall" in s. 86. Effluxion of time makes the decree absolute.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows :—

In this case a decree for foreclosure was made in the ordinary form under s. 86 of the Transfer of Property Act. Subsequently the plaintiff, without taking any proceedings under s. 87, obtained an order for possession of the property and got possession accordingly. There were then some proceedings with reference to setting aside the decree which are not material to the present purpose.

Subsequently the appellant before us, the mortgagor, made an application to be allowed to redeem this property. The application was allowed by the Munsiff on the ground that no order had been obtained under provisions of s. 87 of the Transfer of Property Act, but the District Judge on appeal set aside that order and dismissed the application for redemption.

We think the Judge was wrong in the order that he made, and that the Munsiff was right. The terms of s. 86 have been taken apparently from the terms of the decree which was formerly made in the Court of Chancery in England, and there is no doubt that, under the procedure of that Court, the mortgagor was entitled to redeem, at any rate, up to the final order of foreclosure. There is authority showing that, even when that final order was made, the mortgagor could redeem; but for the present purpose it is not necessary to consider those cases. Apart, however, from the English cases, it is quite clear that the Legislature in enacting s. 87 intended to give *some* effect to it, but if the respondents' contention were right, this section would be of no effect, and s. 86

plus non-payment of the money would give a right of possession. Section 87 of the Transfer of Property Act provides that if the payment be not made within the time fixed in the decree, "the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him, be debarred absolutely of all right to redeem the mortgaged property." That means that without such an order the defendant would not be debarred of all right to redeem the mortgaged property. The fact that the Legislature allowed the plaintiff to apply for such an order, shows that, without that order, the right to redeem would not be taken away. Section 87 goes on to say: "and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff." If the property be not redeemed, the Court would have to pass an order absolute. It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order *nisi*, and the mortgagor can at any time, until the order absolute is made, redeem his property. It was always the procedure, both in England and here, that, until there was an order that absolutely debarred the mortgagor from his rights, he could redeem. Of course the Court might put him on terms if there had been any delay, but there is no doubt that until there is an order taking away his right, he is entitled at any time to redeem.

As to interest, it seems that the mortgagee obtained possession on the 14th Jannary 1887. The six months provided in the decree expired on the 4th July 1886, and the applicant, appellant, had paid into Court the principal, interest and costs.

We think that the respondent is entitled to interest on the whole amount due on the mortgage for principal and interest at the end of the six months from decree, at six per cent. per annum from 4th July 1886 to 14th January 1887, when he took possession. He is clearly not entitled to any interest after the 14th January 1887.

The appellant does not ask for any account of mesne profits, so there will be no account of mesne profits from that date till now. The applicant will have one month from the date this order reaches the Court of the Munsiff to pay the interest which he

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has not paid. If he does pay he will be entitled to possession of the property, and if he does not pay, it will be open to the other side to proceed in accordance with the law and to apply for an order under s. 87 of the Transfer of Property Act.

The appellant is entitled to his costs in all the Courts.

C. D. P. *Appeal allowed.*

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1888 *December* 4.

AKSHOY KUMAR NUNDI (PLAINTIFF) *v.* CHUNDER MOHUN CHATHATI AND OTHERS (DEFENDANTS).*

Limitation Act (*XV of* 1877), *Art.* 179, *cl.* 2—"*Appeal presented*"—"*Where there has been an appeal.*"—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 541—*Execution of decree.*

The words "*appeal presented*" in the Limitation Act 1877, mean an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure.

The words "*where there has been an appeal,*" in Art. 179, cl. 2, of Sch. II, of the Limitation Act, 1877, mean where a memorandum of appeal has been presented in Court.

In the execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court.

APPEAL from the order of the District Judge of Dacca, affirming the order of the 25th February 1888, of the First Munsiff of Munshigunge, refusing an application for the execution of a decree as time-barred.

On 31st December 1884, the plaintiff Akshoy Kumar Nundi obtained a decree against the defendants Chunder Mohun Chathati and others. From this decree the defendants appealed to the Judge. The appeal was presented after time, and on this ground was rejected on the 10th February 1885. The defendants then filed a second appeal in the High Court, which was dismissed with costs on the 16th February 1886.

On 4th January 1888, more than three years from the date of the decree of the Court of first instance, the plaintiff applied for the execution of his decree. The First Munsiff of Munshigunge

* Appeal from Order No. 293 of 1888, against the Order of T. D. Beighton, Esq., Judge of Dacca, dated the 3rd of May 1888, affirming the order of Baboo Jadub Chunder Sen, Munsiff of Munshigunge, dated the 25th of February 1888.

held that the application was barred by three years' limitation under Art. 179, Sch. II of the Limitation Act: that time began to run from the date of the decree of the Court of first instance, the appeal to the District Judge being in fact no appeal since it had been dismissed as out of time; and, accordingly, he dismissed the application on the 25th February 1888.

On appeal the Judge upheld the order of the Munsiff; and the plaintiff appealed to the High Court.

Baboo *Huri Mohun Chuckerbutty* for the appellant.

Baboos *Srinath Das* and *Baikánt Nath Das* for the respondents.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

This appeal arises out of an application for execution of a decree. Previously in a litigation between the two parties, the defendants appealed from the decree of the first Court. That appeal was rejected on the ground that it was presented after time, and defendants then filed a second appeal to this Court which was dismissed with costs. On plaintiff seeking to take out execution of the decree, it was objected that the time ran from the date of the decree of the first Court, and that the application was barred. We do not think that that contention is correct. Section 4 of the Limitation Act says: * * * "Every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." Section 5 says: "If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted presented or made on the day that the Court re-opens." That shows that what is meant by the words "appeal presented" in the Limitation Act is an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure, that is to say, presented by a proper person to the proper Court.

Article 179 of the second schedule of the Limitation Act says: "Where there has been an appeal, limitation begins to run from the date of the final decree or order of the Appellate Court." In

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this appeal it has been contended, on behalf of the respondent, that the words "where there has been an appeal," mean, where there has been an appeal presented and admitted, and in support of that he refers us to a case of *Dianatullah Beg* v. *Wajid Ali Shah* (1). There are no such words in ss. 4 and 5 as "appeal admitted," and there is nothing in those articles of the Limitation Act, or in s. 541 of the Code of Civil Procedure, that would admit of such a construction.

We are, therefore, of opinion that the words, "where there has been an appeal," mean where there has been an appeal in the ordinary sense and in the sense in which it is used in the other portions of the same Act, *viz.*, when a memorandum of appeal has been presented in Court. We think that the lower Courts are wrong in saying that execution is barred. We, accordingly, set aside the orders of the lower Courts with costs.

C. D. P.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Wilson.

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February 14

BENODE COOMAREE DOSSEE (DEFENDANT) *v.* SOUDAMINEY DOSSEE (PLAINTIFF).*

Injunction—Mandatory injunction—Damages—Light and air—Ancient lights.

Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted.

Mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief.

Jamnadas Shankarlal v. *Atmaram Harjivan* (2) referred to.

The law regarding relief by mandatory injunction explained.

* Appeal No. 25 of 1888 against the decree of Mr. Justice Trevelyan, dated the 26th July 1888.

(1) I. L. R., 6 All., 438.

(2) I. L. R., 2 Bom., 138.